Supreme Court, U.S.
FILED
SEP 19 1995
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No. 94-1829 & 94-1976

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1994

LEGISLATURE OF THE STATE OF ALASKA,
Petitioner,

v.

STATE OF ALASKA,
Respondent,

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR
Respondent.

On Petition For a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

PETITIONER'S REPLY BRIEF

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September 19, 1995

Balmar Legal Publishing Services, Washington, D.C. (202) 682-9800

18 pp

TABLE OF CONTENTS

		PAGE
TABLE OF AUTHORITIES		ii
I.	PETITIONER SEEKS TO INTERVENE IN THE COURT OF APPEALS ON BEHALF OF ITSELF IN ORDER TO PROTECT ITS OWN DISTINCT INTEREST GRANTED TO IT BY LAW	2
II.	PETITIONER HAS DEMONSTRATED A LEGALLY PROTECTED INTEREST THEREBY SATISFYING THE REQUIREMENTS OF ARTICLE III STANDING	3
III.	THE OUTCOME OF THIS LITIGATION WILL EFFECT THE PETITIONER'S AUTHORITY TO LEGISLATE	6
IV.	THE GOVERNMENT'S DISCUSSION OF THE UNDERLYING SUBSTANTIVE MERITS OF THIS CASE IS PREMATURE AND IS RELEVANT ONLY TO THE IMPORTANCE OF INTERVENTION	6
V.	THE COURT OF APPEALS' DENIAL OF INTERVENTION IN THIS CASE HAS PRECEDENTIAL VALUE	7
VI.	CONCLUSION	9

TABLE OF AUTHORITIES

CASES	PAGES
Coleman v. Miller, 307 U.S. 433 (1939)	6
Karcher v. May, 484 U.S. 72 (1987)	4, 5
Korioth v. Briscoe, 523 F.2d 1272 (5th Cir. 1975) . .	6
Mountain States Legal Foundation v. Costle, 630 F.2d 754 (10th Cir. 1980), *cert. denied*, 450 U.S. 1050 (1981)	4
State of Alaska v. Babbitt, 54 F.3d 549 (9th Cir. 1995)	7
Texas v. Pullman, 312 U.S. 496 (1941)	4
Totemoff v. State of Alaska, 1995 Alas. LEXIS 85 (Alaska Supreme Court 1995) . . .	8
Warwick v. State ex rel Chance, 548 P.2d 384 (Alaska 1976)	4
RULES AND REGULATIONS	
Alaska R. App. P. 407	4

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PETITIONER'S REPLY BRIEF

Petitioner, the State Legislature of Alaska, respectfully submits this reply brief in further support of its petition for writ of certiorari and in reply to the brief in opposition by the United States (hereinafter "the Government").

I. PETITIONER SEEKS TO INTERVENE IN THE COURT OF APPEALS ON BEHALF OF ITSELF IN ORDER TO PROTECT ITS OWN DISTINCT INTERESTS GRANTED TO IT BY LAW.

The Petitioner does not seek to intervene on behalf of the State as a whole, or on behalf of the citizens of Alaska. The Petitioner seeks to intervene on behalf of itself, in its capacity as a state legislature to protect its own distinct interest -- the ability to effectively legislate with regard to the management of fish and wildlife on public lands in Alaska -- a right granted to it specifically by the Alaska Constitution and the Alaska Statehood Act and Compact, both approved by Congress. Petition at 10-11, A 75, 80-83.

The Government attempts to confuse the issue before this Court by arguing that the Petitioner is seeking to intervene on behalf of the State of Alaska (as opposed to on behalf of itself -- the state legislature) and that, because of this fact, Petitioner has not demonstrated the requisite Article III interest for standing. Government Brief in Opposition at 12 (hereinafter Brief in Opposition). This argument is factually incorrect -- Petitioner does not seek to represent the State of Alaska, but instead to vindicate its right to legislate in this particular area.

The Government focuses on the Resolution (A 70), overwhelmingly passed in both Houses of Petitioner, in support of this argument. The Resolution *authorized* Petitioner's intervention -- it was not designed or intended to present the Article III legal basis for intervention. Moreover, the fact that the Petitioner is seeking to protect its interests as a state legislature (and not to act as representative of the state as a whole) is evident from all of the papers filed by Petitioner before the Ninth Circuit. *E.g.*, Emergency Motion for Leave to Intervene, at 2, 3, 6 (filed January 27, 1995) ("This motion to intervene . . . is being made because of the exceptional circumstances which have arisen and the unique rights of the State Legislature." "[The Legislature's]

ability to legislate and function in this area will be considerably curtailed if the challenged regulations are allowed to take effect." "The Legislature should be granted intervenor status in this appeal so that the Legislature's and State's interests[1] may be properly represented."); *See also* Memorandum in Support of Emergency Motion for Leave to Intervene, at 12-15 (filed February 1, 1995) ("The Legislature clearly has a unique interest which it seeks to vindicate in this appeal." "The Alaska Constitution specifically empowers the Legislature both to legislate and to regulate the use and allocation of Alaska's natural resources. . . .); *Id.* at 15 (". . . the Legislature has an interest in protecting its right to legislate in this important area."); *See also* Legislature's Letter Brief (filed February 7, 1995) at 3, 6 ("The Legislature is *in fact* restricted from legislating by the challenged regulations." ". . . the Legislature is intervening to protect an interest which it traditionally has standing to assert, namely, its ability to legislate.").

II. PETITIONER HAS DEMONSTRATED A LEGALLY PROTECTED INTEREST THEREBY SATISFYING THE REQUIREMENTS OF ARTICLE III STANDING.

Based on the Government's factually incorrect argument that Petitioner seeks to intervene on behalf of the State, the Government argues that Petitioner "has not satisfied one of the 'irreducible constitutional minimum' requirements of Article III, that it demonstrate injury to a 'legally protected interest.'"

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[1] The fact that intervention will enure to the benefit of the State and the people of Alaska as a whole (of course, it is in the interest of the State and the people of Alaska, that the powers granted to its state legislature by the Alaska Constitution and the Alaska Statehood Act and Compact not be usurped and denigrated or improperly preempted by the Secretary) does not detract from the immutable fact that the Petitioner seeks to intervene to protect its own unique interest -- the ability to effectively legislate in this important area.

Brief in Opposition at 10.[2] Petitioner did, however, demonstrate injury to a legally protected interest -- the ability to effectively legislate with regard to the management of fish and wildlife on public lands. Petition at 10-13.

The Government next argues that *Karcher v. May*, 484 U.S. 72 (1987) provides that a state legislature must have state law authorization in order to represent the state as a whole in litigation. Again, the Government makes this argument because it mistakenly believes that Petitioner seeks to intervene on behalf of the state as a whole. Brief in Opposition at 10-12.[3]

As a preliminary matter, the Government's interpretation of *Karcher* is incorrect. The issue in *Karcher*, was whether the Speaker of the New Jersey General Assembly and the President of the New Jersey Senate "sought and obtained permission to intervene as defendants *on behalf of the legislature*," not on behalf of the state. *Karcher*, 484 U.S. at 75 (emphasis added);[4]

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[2] The Government relies on *Mountain States Legal Foundation v. Costle*, 630 F.2d 754 (10th Cir. 1980), *cert. denied*, 450 U.S. 1050 (1981). Yet, in *Mountain States*, the state legislators sought to intervene *on behalf of the State of Colorado* as a whole and not on behalf of their own interests as state legislators or on behalf of the entire state legislature. *See* Petition at 17, n.28.

[3] Petitioner also established that it had state law authority to bring a lawsuit in its own name. Petition at 20-21. (And the Government points to no Alaska statute which prevents Petitioner from intervening in this lawsuit -- obviously, if there was one, it would have been cited.)

> If the decision of the court of appeals was based upon an interpretation of state law regarding the ability of Petitioner to bring a lawsuit on its own behalf, that question should have been certified to the Alaska Supreme Court pursuant to Alaska R. App. P. 407. *See Texas v. Pullman*, 312 U.S. 496 (1941); *Warwick v. State ex rel Chance*, 548 P.2d 384 (Alaska 1976); Petition at 21, n.34.

[4] The issue before this Court in *Karcher* was "whether public officials who have participated in a lawsuit solely in their official capacities may appeal an adverse judgment after they have left office." *Karcher*, 484 U.S. at 74.

Id. at 81 ("The New Jersey Supreme Court has granted applications of the Speaker of the General Assembly and the President of the Senate to intervene as parties-respondent *on behalf of the legislature* in defense of a legislative enactment.") (emphasis added).[5] Second, even if *Karcher* could be read to require state law authorization for a state legislature to represent the state as a whole, this is not what Petitioner seeks to do in this case. Finally, *Karcher* demonstrates that a state legislature has standing, separate from the State as a whole, to defend a legislative enactment. *See* Petition at 12.[6]

The Government concedes that a state legislature has standing to protect its own unique interests. Brief in Opposition at 12. ("The Legislature has standing only if it has some other, distinct interest (other than representing the State as a whole) that would be affected by the case"). Likewise, the Government concedes that the legislative standing cases cited in the Petition stand for the proposition that state and federal legislative bodies and individual legislatures have Article III standing to represent their own interests.[7]

As set forth fully in the petition for certiorari, Petitioner has demonstrated that it, as a state legislature, is seeking to intervene

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[5] Here, Petitioner was authorized to intervene on its own behalf.

[6] As Justice White pointed out in his concurrence, by allowing the legislature to intervene to defend the suit when the state executive did not wish to assert the statute's constitutionality, this Court "acknowledged that the New Jersey Legislature and its authorized representative have the authority to defend the constitutionality of a statute attacked in federal court." *Karcher*, 484 U.S. at 84-85. The case makes clear that a state legislature has a protected interest in defending its legislation as well as its ability to legislate.

[7] The Government attempts to distinguish those cases, however, on the ground that "in those cases . . . the legislators were not seeking to represent the interest of the State or of the United States as a whole, but were attempting to protect the legislature's separate interest in a specific role in the lawmaking or governing process . . ." Brief in Opposition at 12. Yet that is exactly Petitioner's position -- it is representing its own distinct interest.

in the court of appeals in order to protect its own unique interest, and not to represent the interest of the State as a whole. Petition at 9-13. This being the case, the Government's entire argument against Article III standing is misplaced.

III. THE OUTCOME OF THIS LITIGATION WILL EFFECT THE PETITIONER'S AUTHORITY TO LEGISLATE.

In addition, the Government's suggestion that the outcome of this litigation will not effect the Petitioner's ability to legislate on issues regarding the management of fish and wildlife is absurd.[8] The issue is not, as the Government suggests, whether the Petitioner will be able to legislate on *any* issue, but whether it will be able to *effectively* legislate on *this* issue. *E.g.*, *Coleman v. Miller*, 307 U.S. 433, 438 (1939); *Korioth v. Briscoe*, 523 F.2d 1271, 1277-78 (5th Cir. 1975). *See also* Petition at 10-13. The Petitioner has a right under the Alaska Statehood Act and Compact and the Alaska Constitution, both federally ratified, to effectively legislate on this issue and to have is votes given effect. Petition at 10-11. The Secretary's action is clearly an abridgment of that right.

IV. THE GOVERNMENT'S DISCUSSION OF THE UNDERLYING SUBSTANTIVE MERITS OF THIS CASE IS PREMATURE AND IS RELEVANT ONLY TO THE IMPORTANCE OF INTERVENTION.

Next, the Government provides a brief and convoluted argument on the underlying substantive merits (suggesting that ANILCA's federal preemption of Petitioner's authority is valid pursuant to the Supremacy Clause and that therefore the Petitioner has no interests to protect) and suggests that Petitioner did not argue in its petition that "ANILCA is unconstitutional" --

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[8] Brief in Opposition at 15 ("Neither ANILCA nor this litigation has any effect on the Legislature's ability to perform its role in the state legislative process of considering and passing laws.").

implying that this would have been a fatal error. Brief in Opposition at 16.

First, Petitioner did discuss the constitutional implications of the underlying substantive merits -- an improper exercise of preemption pursuant to the Supremacy Clause -- in the section of the petition for certiorari on the exceptional importance of intervention. *See* Petition at 21-25. Second, the Government's discussion of the underlying substantive merits of this case is untimely and irrelevant (other than as to the importance of the issues Petitioner seeks to present by this intervention) -- to whether Petitioner had Article III standing to intervene before the court of appeals.

V. THE COURT OF APPEAL'S DENIAL OF INTERVENTION IN THIS CASE HAS PRECEDENTIAL VALUE.

There is precedential value with regard to the denial of intervention. Although the motion to intervene denied by the court of appeals took the form of an unpublished order, the decision on the continued appeal reported the denial of the motion to intervene and the basis for such denial -- in a *published* opinion:

> The Alaska Legislature, angry with the Governor's directive to the Attorney General to stipulate to the dismissal, filed an emergency motion for intervention and, in the alternative, for substitution, or for stay. *We denied its motion, concluding that the Legislature was not empowered under state law to intervene in the appeal. In light of the dismissal with prejudice of that issue, the district court's holding on this issue stands.*

State of Alaska v. Babbitt, 54 F.3d 549, 550 n.2 (9th Cir. 1995) (emphasis added) A-55-56.

Moreover, the district court opinion on the authority issue, as well as the published Ninth Circuit decision on the merits on

the other issues (which presumes the authority of the Secretary to establish the Federal Subsistence Board, promulgate regulations thereunder and to manage fish and wildlife)[9] will carry the precedential weight of *stare decisis*. Petition at 15-16.

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[9] Since the filing of the petition for certiorari, the Alaska Supreme Court has held that notwithstanding the Ninth Circuit and federal district court opinions, ANILCA does not preempt state regulation of hunting and fishing for subsistence purposes on public lands.

> We are not obliged to follow [the Ninth Circuit holding] since this court is not bound by decisions of federal courts other than the Supreme Court. . . .
>
> For a number of reasons . . . the federal government has no authority to regulate hunting and fishing in Alaska's navigable waters.

Totemoff v. State of Alaska, 1995 Alas. LEXIS 85 at 23-24 (Alaska Supreme Court, 1995).

This opinion serves to further emphasize the state/federal disparity which exists and the urgent need to have this issue resolved. *See* Petition at 26.

VI. CONCLUSION

The denial by the court of appeals of the Petitioner's intervention and the entry of the dismissal challenging the Secretary's authority should be reversed and the matter remanded with instructions to permit Petitioner's intervention and full participation in this case. Alternatively, the petition for a writ of certiorari should be granted on the intervention issue.

Respectfully submitted,

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